1. The purpose of Ohio's tax credit is to encourage domestic industry.

Ohio's investment tax credit does not have a discriminatory purpose. The Ohio investment tax credit is open and available to any manufacturer that chooses to do business in Ohio. It applies equally to all manufacturers regardless of where else they may choose to do business. Moreover, the "design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing state" is a "laudatory goal" recognized by this Court. *Trinova,* 498 U.S. at 385-86 (quoting *Boston Stock Exch. v. Tax Comm'n*, 429 U.S. 318, 336 (1977)). This Court recently reiterated that constitutional deference by confirming that "[o]ur earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs." *Kelo v. City of New London,* 125 S.Ct. 2655, 2005 U.S. LEXIS 5011, at *24 (2005). In the Commerce Clause context that translates into States being free to "structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336-37; *Caterpillar,* 488 N.W. 2d at 192; *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) ("[T]he State has a legitimate interest in local neighborhood preservation, continuity, and stability.").

a. State tax incentives encourage domestic industry by promoting brownfield revitalization

Federal and state policy (both of which are implemented on the local level) have long encouraged and incentivized businesses to invest in existing facilities as a way to stem development onto undeveloped land. As urban chambers of commerce, these *Amici Curiae* are on the front lines of promoting and administering these important

policies, yet without state legislation they are virtually powerless to effectively address the problem. One commentator summarized this "brownfields redevelopment" issue as follows:

> [B]rownfield sites continue to litter America's urban landscape, leading federal, state and local policymakers to turn to more broad-based environmentally impaired properties. Familiar to economic development officials and those who finance projects in designated revitalization and empowerment zones, newly adopted brownfield incentives take the form of property tax abatements, low-interest loans, grants, and expensing of project costs for income tax purposes. . . . [This] movement toward government tax and financial incentives reflects a recognition of the larger community interest in successful brownfields redevelopment....[2]

If those goals are not pursued on a local level, they may not get implemented at all. "[S]tates may be more willing than the federal government to supply necessary funds or offer incentives in order to facilitate cleanup. States are especially motivated because empty brownfields do not contribute to the tax base of the states' communities."[3]

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[2] Scott Sherman, "Government Tax and Financial Incentives in Brownfields Redevelopment: Inside the Developer's Pro Forma," 11 N.Y.U. ENVTL. L.J. 317, 318 (2003).

[3] Brian Thomas Lang, "Note: Ohio's Voluntary Action Program: Solving Ohio's Toxic Waste Woes?" 60 OHIO ST. L.J. 285, 286 (1999) (citing Andrea Lee Rimer, "Environmental Liability and the Brownfields Phenomenon: An Analysis of Federal Options for Redevelopment," 10 TUL. ENVTL. L.J. 63, 106 (1996) ("Mayors of thirty- three cities

These laudable policies encourage businesses to keep jobs close to the people who need them most, to attract capital investment, and to modernize existing manufacturing buildings. *Caterpillar*, 488 N.W.2d at 192 (citing *Boston Stock Exch.*, 429 U.S. at 336-37). These policies support state and local tax incentive programs and are of exceptional public importance to every citizen, community, and local government. Therefore, state and local tax incentives are a common and useful tool, because they directly address and promote each of these policy considerations. Rather than consider those purposes and economics, the Sixth Circuit improperly rejected those interests. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (stating that the Court has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects" when evaluating business incentives).

b. State laws that fairly encourage in-state business and domestic industry do not have a discriminatory effect on interstate commerce

The Commerce Clause permits states to enact laws that have the "effect of encouraging domestic industry." *Bacchus*, 468 U.S. at 271-72. Certainly, "[a] discriminatory effect does not result from fair encouragement of in-state business...." *Caterpillar*, 488 N.W.2d at 193 (citing *Armco, Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984); *Boston Stock Exchange*, 429 U.S. at 336-37)). Directly responsive to that authority, the Sixth Circuit recognized that Ohio's investment tax credit had the "same economic effect" as tax programs that this Court ruled "do[ ] not ordinarily run

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estimated lost tax revenues of $131 million due to undeveloped brownfields. . . Without programs designed to reinvigorate brownfields in inner cities, industry will continue to move to greenfields-pristine land surrounding suburbs and localities will continue to lose valuable property taxes critical to educate children and maintain infrastructure.")).

afoul" of the dormant Commerce Clause, such as subsidies. *Cuno v. Daimler Chrysler, Inc.*, 386 F.3d 738, 746 (6th Cir. 2004); *see also West Lynn Creamery*, 512 U.S. at 199, n.15 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)). Yet, contrary to that finding, the Sixth Circuit still concluded that Ohio's statute had a discriminatory effect. The reality is that the only discriminatory effect that could result is if the Sixth Circuit's ruling is permitted to stand. *See Hughes v Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring) (the lower court's "novel interpretation of the 'burden' concept represented a departure which, had it been accepted, would impair rather than protect interstate commerce.").

Economic development, and therefore increased domestic industry, occurs "'when a local economy is vitalized, for example, by the creation of a job that is supported by external resources.'"[4] Basic economic theory recognized by the federal government, States, municipalities, and economic developers further establishes that direct job creation data must be multiplied many times to truly understand the far-reaching benefits of new business development.[5] When viewed in light of those economic

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[4] Kathleen A. Norat & Eileen M. Lomorielo, "Clawbacks: A Help or A Hindrance in Negotiating Incentive Benefits?" J. MULTISTATE TAX'N & INCENTIVES, 2004 WL 335216 at *27 (Feb. 2004) (citing Economic Development Today: A Report to the Profession (American Economic Development Council, 1984)).

[5] *See* Regional Multipliers, U.S. Dept. of Commerce, March 1997 (3rd ed.); Elizabeth Weissman & Catherine G. Ware, "A Holistic Approach to Business Relocation and Expansions," J. MULTISTATE TAX'N & INCENTIVES, 1999 WL 1711518 at *31 (Aug. 1999) ("Most communities recognize that the creation of new jobs and the expenditure of significant capital result in the attraction of ancillary, new industries to a community, commonly referred to as the multiplier effect.") (citing Deming, Quality, Productivity, and Competitive Position (1982)).

realities, States' successes in encouraging intrastate commerce, growth, and development is easily illustrated by recent data on the direct and multiplier effects of state tax incentive programs from within the Urban Chambers' states.

From 1997 to the present, the Commonwealth of Kentucky has generated over $10.8 billion in capital investment as a result of its tax credits and wage assessment programs with the creation of over 54,000 direct jobs in the manufacturing sector and over 20,000 direct jobs in the non-governmental services sector. The manufacturing jobs generate an estimated annual payroll of $1.6 billion, and the service sector jobs generate an estimated annual payroll of $851 million. Applying recognized economic modeling,[6] these jobs result in an economic impact that includes over 138,000 indirect and induced jobs in the Commonwealth and additional indirect and induced annual earnings of $2.7 billion in the Commonwealth. The total economic impact on the state from these programs includes over 213,000 total jobs and $5.1 billion total earnings.[7]

From 1997 through 2002, the State of Tennessee generated over $17 billion in capital investment as a result of its tax credit programs with the creation of over 39,000 jobs in the manufacturing sector and 55,500 jobs in the non-governmental services sector. These jobs generate an estimated annual payroll of $4.17 billion. Applying the same methodology, these jobs result in an economic impact that includes over 109,000 indirect and induced jobs in the State

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[6] The Minnesota IMPLAN Group, Inc.'s IMPLAN System was used and is similar to the U.S. Department of Commerce's methodology for estimated the economic impact of new investment. *See* Regional Multipliers, U.S. Dept. of Commerce, March 1997 (3rd ed.).

[7] These analyses are based on data obtained from the Kentucky Cabinet for Economic Development.

and additional indirect and induced annual earnings of $2.4 billion in the State. The total economic impact on the State from these programs includes over 204,000 total jobs and $6.6 billion total earnings.[8]

Therefore, the full beneficial measure of these programs cannot be overstated. They are invaluable to job and earnings creation, domestic industry, and other economic benefits to the Urban Chambers and their members.[9] Removal of this economic development tool will place an undue burden on States and local chambers of commerce as they promote economic development, domestic business, and interstate commerce. However, given the Sixth Circuit's treatment of this case, that information and evidence was not even considered.

c. The record below does not support a summary finding that Ohio's tax incentive had a discriminatory purpose or effect.

The District Court dismissed this matter on the pleadings under Federal Rule of Civil Procedure 12(b). The Sixth Circuit necessarily accepted the plaintiffs-respondents' appeal of the matter with that procedural posture. Nevertheless, based upon the plaintiffs-respondents' mere allegations regarding the purpose and effect of Ohio's tax credit, the Sixth Circuit summarily granted judgment to

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[8] These analyses are based on data obtained from the State of Tennessee. Tennessee's data is based upon an aggregation of jobs into two categories-manufacturing and non-manufacturing.

[9] *See* Sherman, *supra* note 2, at 370-71 ("Success stories abound, from a new urban baseball stadium on the site of a former rail yard to a vibrant mixed-use complex in the heart of the central business district. In each of these ventures, the various incentives – regarding developers willing to take on these projects notwithstanding the greater risks involved – no doubt helped to move them from concept to reality.").

plaintiffs-respondents and enjoined Ohio from applying its tax incentive program.[10] Absent evidence by plaintiffs-respondents of a discriminatory purpose or effect, summary disposition in their favor was improper. *Trinova*, 498 U.S. at 385-86 ("Neither Trinova nor the secondary sources it relies upon present any evidence that the SBT was inspired as a way to export tax burdens or import tax revenues.").

Therefore, the appropriate resolution is to (a) recognize, as a matter of law, the legitimate purpose and effect of these state tax incentives or (b) require plaintiffs-respondents to submit evidence that meets their burden of proof on that issue, which petitioners, of course, would have an opportunity to rebut and would likewise be able to present their own evidence.

2. The Sixth Circuit Court of Appeals decided an important Commerce Clause question in a way that conflicts with the Michigan Supreme Court and significantly departs from this Court's long-standing precedent.

In what should have ended the analysis entirely, the Sixth Circuit acknowledged that the Ohio investment tax credit is "equally available to in-state and out-of-state businesses." *Cuno*, 386 F.3d at 743. In *Complete Auto Transit, Inc. v. Brady*, this Court established the four-part test for analyzing state tax programs under the Commerce Clause. 430 U.S. 274, 279 (1977). In the lower court, plaintiffs-respondents challenged the Ohio statute on only one of those four elements. That is, the parties did "*not* dispute that the tax provisions at issue have sufficient nexus

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[10] The Sixth Circuit has stayed enforcement of its ruling and injunction pending resolution of the parties' petitions for writs of *certiorari*.

with the state, are fairly apportioned, and are related to benefits provided by the state." *Cuno*, 386 F.3d at 742 (emphasis added). The plaintiffs-respondents' only contention was that Ohio's investment tax credit discriminates against interstate commerce. That limited constitutional challenge controls here and compels review and reversal.

As this Court pronounced, "[a]t least in the interstate commerce context . . . the antidiscrimination principle has not in practice required much in addition to the requirement of fair apportionment." *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 171 (1983). In this case, the plaintiffs-respondents provided no supporting evidence. Yet, contrary to *Container Corp.*'s guidance, the Sixth Circuit found discrimination where none existed.

In addition, the Sixth Circuit's opinion is directly opposite that of the Michigan Supreme Court in *Caterpillar*, addressing the constitutionality of a virtually identical state tax credit program. There, the court addressed a statutory deduction from Michigan's single business tax related to the acquisition of capital assets. Even though the deduction applied only to "capital acquisition related to Michigan business activity," the Michigan Supreme Court found no discrimination under the Commerce Clause. The Michigan court found that no discriminatory purpose was implicated because "the promotion and development and investment of business" in a state does not violate the Commerce Clause. *Caterpillar*, 488 N.W.2d at 192. In addition, the Michigan court found no discriminatory effect because the tax incentive was "available for any taxpayer." *Id.*

With essentially the same facts, the Sixth Circuit and the highest court of Michigan reached opposite conclusions. That alone is sufficient grounds for granting a writ of

certiorari to review and correct the conflicting rulings. Supreme Court Rule 10(a).

3. Ohio's tax credit does not interfere with free trade among the states.

While the economic incentive programs offered by Ohio's sister states are distinguishable from Ohio's investment tax credit, the Sixth Circuit's decision threatens to create significant uncertainty and adverse economic consequences for States, cities, and businesses throughout the Sixth Circuit and the country. Based upon the plaintiffs-respondents' admittedly novel theory, the Sixth Circuit fundamentally altered Commerce Clause jurisprudence, threatening the viability of economic development programs throughout the country, preventing the Urban Chambers from fairly competing in the global economy, and placing an undue burden on interstate commerce.

In general, "constitutionality under the Commerce Clause ... depends upon the practical effect" of the tax. *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750 (1978); *Complete Auto Transit*, 430 U.S. at 279. For state tax programs in particular, this Court has stated that they must have internal consistency, *i.e.*, "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *American Trucking Ass'n, Inc. v. Scheiner*, 482 U.S. 266, 284 (1987) (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)). Virtually every state employs tax incentives for promoting economic development. And regardless of any arguments as to the efficacy of those incentive programs, there is absolutely no evidence that they are interfering with free trade or harming any citizen or

taxpayer.[11] The interference with free trade comes only by means of the Sixth Circuit's opinion prohibiting Ohio from employing the competitive tools used for decades and available to the remaining States.

As illustrated by the job creation and economic impact data provided in Section I.b. above, neither the Ohio investment tax credit nor the tax incentives of its nearby sister states have interfered with free trade. Rather, far from impeding interstate commerce, the added investments and accompanying multiplier effect have generated significant commerce, including a substantial number of jobs. The end result, prior to the Sixth Circuit's decision, was that all States were benefiting from increased business operations in their home territory attained via interstate competition. This is no longer possible if the Sixth Circuit's decision is not reviewed and, ultimately, reversed.

CONCLUSION

The Ohio investment tax credit has neither an impermissible purpose nor an impermissible effect. The Court should grant the Ohio Petitioners' and DaimlerChrysler's petitions for writ of *certiorari* and reverse the Sixth Circuit's ruling on the constitutionality of Revised Code § 5733.33.

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[11] Professor Enrich stated that citizens/taxpayers, such as the Respondents, "can point to no direct reduction of [their] tax liability or any assured expansion of services that the elimination of the challenged tax break would yield." Peter D. Enrich, "Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business," 110 HARV. L. REV. 377, 414 (Dec. 1996).

July 20, 2005

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In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,
Petitioners,

v.

CHARLOTTE CUNO, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* MICHIGAN ECONOMIC DEVELOPMENT CORPORATION IN SUPPORT OF PETITIONERS DAIMLERCHRYSLER CORPORATION, AND STATE OF OHIO

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Michigan Economic Development Corporation ("MEDC") is a public body corporate created under section 28 of Article VII of the State of Michigan Constitution of 1963, and the Urban Cooperation Act of 1967, 1967 PA 7, MCL 124.501 to 124.512, by contractual interlocal agreement effective April 5, 1999 between local participating economic development corporations formed under the Economic Development Corporations Act, 1974 PA 338, MCL 125.1601 to 125.1636, and the Michigan Strategic Fund, a state agency.

The MEDC's interest in this case arises from the fact that it administers most of the economic development programs of the State of Michigan, including certain programs involving tax credits, and is the principal governmental agency in Michigan for promoting economic development. Because the State of Michigan resides within the Sixth Circuit, the court of appeals' decision in this matter would serve as binding precedent in federal courts in Michigan, and therefore may affect Michigan laws involving economic development matters.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* state that no counsel for a party has written this brief in whole or in part, and no person or entity, other than amicus, its members, or their counsel, has a made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

The MEDC urges the Court to grant Petitioners' DaimlerChrysler Corporation and State of Ohio (the "Petitioners") Petitions for a Writ of Certiorari and asserts that the decision of the Sixth Circuit in this matter requires immediate review for the following reasons:

1. It is not supported by the case law which it cites as its supporting precedent; to the contrary, this decision is in fact unprecedented and is counter to prior well established precedents.

2. The decision is internally inconsistent and contradictory because it upholds a property exemption on the basis that it is "related to the use or location of the property itself," yet invalidates the Ohio investment tax credit, which also meets this criteria.

3. The decision is inconsistent with prior U.S. Supreme Court and other higher court opinions, upholding Michigan tax laws that include similar, though not identical, tax credits or deductions as being valid under the U.S. Commerce Clause.

INTRODUCTION

The Michigan Economic Development Corporation ("MEDC") supports the Petitioners' Petitions for a Writ of Certiorari. The MEDC files this Amicus Curiae brief because of its apprehension that the Sixth Circuit has embarked on a radical departure from well settled precedents interpreting the "Dormant" Commerce Clause doctrine as it applies to state tax law. As previously acknowledged by the Plaintiffs, they propose a "novel legal theory." The MEDC strongly believes

that the Sixth Circuit's acceptance (at least in part) of this "novel legal theory" contradicts many well established precedents, and must be reviewed and reversed, immediately.

ARGUMENT

This matter arises from the Sixth Circuit's decision filed on September 2, 2004, and amended on October 19, 2004 where it invalidated an Ohio investment tax credit ("Ohio ITC") as violative of the Dormant Commerce Clause. The Ohio ITC grants a credit against that state's corporate franchise tax for "purchases of new machinery and equipment... provided..[it is] installed in [Ohio]." Ohio Rev. Code §5733.33(B)(1).

The Sixth Circuit in this case concluded that the Ohio ITC discriminates against interstate commerce by "coercing" businesses already subject to its state franchise tax to expand locally rather than out of state. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 746 (6th Cir. 2004). Furthermore, the Sixth Circuit stated:

> Moreover, as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.

Id. at 743. The Sixth Circuit then concluded that the Ohio ITC violated the third prong of the *Complete Auto Transit*[2] test (i.e., that a tax must not discriminate against interstate commerce). This conclusion is flawed and warrants immediate review for several reasons.

I. The Cases Cited By The Sixth Circuit Do Not Support Its Conclusion.

This case involves a tax incentive promoting purely in-state activity. The reasoning in the three cases cited by the Sixth Circuit are contrary to its conclusion. In *Boston Stock Exchange v. State Tax Commissioner*, 429 U.S. 318 (1997), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388 (1984), this Court addressed legal and factual issues differing significantly from this case. Each of these decisions addressed situations where states essentially imposed a higher tax on some out-of-state good or service which had the effect of giving preferential treatment to in-state businesses; none of these situations, however, involved a tax credit aimed at creating an incentive for in-state capital investment. In all three of the cited decisions (*Boston Stock Exchange, Westinghouse, and Maryland)* this Court struck down tax laws that encouraged the development of local industry by imposing higher transactional taxes on economic activities occurring outside of the state than were imposed on similar in-state activities. The net effect was a tax on the sale of products or services in another state that was higher than on

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[2] *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 97 S.Ct. 1076, 51 L.Ed. 2d 326 (1977)

comparable in-state sales. This is clearly discriminatory.[3] The crucial distinction between the cases cited in the Sixth Circuit's decision and this case is that the Ohio ITC does not tax any out-of-state sales. The Ohio ITC is a one-time "optional" tax incentive that promotes only in-state/intrastate investment. Sales of products or services are not taxed in any way. The Ohio ITC does not give a competitive advantage to in-state taxpayers like the statutes invalidated in *Boston Stock Exchange, Maryland* and *Westinghouse*. In fact, the tax credit appears to be equally available to both in-state and out-of-state businesses.

The Ohio ITC does not constitute the type of discriminatory tax scheme typically held to violate the Dormant Commerce Clause doctrine. The typical application of this doctrine in the context of state tax law is to invalidate discriminatory tax schemes that unduly burden interstate commerce and give a competitive advantage to in-state taxpayers, and disadvantage out of state taxpayers. However, the Ohio ITC does not do this.

The Ohio ITC applies solely to in-state activity. This is exactly the type of tax incentive that has been consistently ruled valid by courts interpreting the dormant commerce clause doctrine. The decision of the lower court must be reconsidered for these reasons.

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[3] The Petition for a Writ of Certiorari of DaimlerChrysler Corporation, at pp. 19 – 21, succinctly spells out the distinction; therefore, we rely upon that argument, and will not reiterate it here.

II. The Sixth Circuit's Reasoning Is Internally Inconsistent And Contradictory

The Sixth Circuit upheld the validity of the personal property tax exemption that was challenged in this case. What is curious about this aspect of the opinion is that the rationale used to uphold the property tax exemption actually supports upholding the validity of the Ohio ITC, as well:

> Although conditions imposed on property tax exemptions may independently violate the commerce clause, conditional exemptions raise no constitutional issues, when the conditions for obtaining the favorable tax treatment are related to the use or location of the property itself. Stated differently, an exemption may be discriminatory if it requires a beneficiary to engage in another form of business in order to receive the benefit or is limited to businesses with a specified economic presence. *Cf. Maryland, 451 US at 756-57* However, if the conditions imposed on the exemption do not discriminate based on an independent form of commerce, they are permissible." (emphasis added). *Cuno,* 386 F.3d at 746-47.[4]

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[4] The Sixth Circuit, while citing no direct judicial authority in support for its determination of the validity of Ohio's personal property tax exemption, looked to *Maryland v Louisiana, infra*, as showing an example of state action that was unconstitutional. As the Court is undoubtedly aware, there is a substantial academic debate ongoing as to the validity of tax incentives on Dormant Commerce Clause grounds. One such article is authored by Professors Hellerstein and Coenen, entitled "Commerce Clause Restraints On State Business Development Incentives," 81 Cornell L. Rev. 789 (1996). This portion of the Sixth Circuit's decision is significant because it appears to adopt the one exception to what

In this case, the Ohio ITC invalidated by the Sixth Circuit is obviously a tax that is "related to the use or location" of the property itself. Though limited to businesses with a specified economic presence within the state, it does not discriminate against "out-of-state" businesses. Thus, the logic the court of appeals used to uphold the property tax exemption appears to support upholding the validity of the Ohio ITC, as well.

Furthermore, the Sixth Circuit admits that a similar subsidy for economic dev lopment purposes would pass constitutional muster. The purpose of the Dormant Commerce Clause doctrine is not to exalt form over substance. Rather, its purpose is to strike down substantial and unjustified burdens on interstate commerce, and tax laws that either facially or in actuality give preferred treatment to specified local interest. The Ohio ITC does neither.

III. Unless Overturned, The Sixth Circuit's Decision is Potentially Disruptive to Economic Development Activity in the State of Michigan.

Two prior court opinions, one by this Court in 1991, the other by the Michigan Supreme Court in 1992 (for which certiorari was denied), addressed the validity of Michigan's taxing scheme and a similar investment tax credit statute in the face of a challenge on commerce clause grounds. If not

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Professors Hellerstein and Coenen termed as their "in-state favoritism/state-coercion" approach: the Commerce Clause is not offended where a state invites a taxpayer or potential taxpayer to invest so long as the tax burden is not increased for that taxpayer should the invitation be declined. *Id.* at p.806 - 7.

reviewed, the holding in this case may call into question the continuing validity of those decisions.

In *Trinova Corporation v. the Department of Treasury*, 498 U.S. 358 (1991), this Court addressed a challenge to Michigan's Single Business Tax ("SBT"). The plaintiff in that case alleged that the Michigan SBT discriminated against out-of-state businesses in violation of the commerce clause. This Court flatly rejected this assertion. Subsequently, the Michigan Supreme Court rejected a challenge on commerce clause grounds to the validity of the capital acquisition deduction ("CAD") of the SBT, which is available only for capital investments related to Michigan business activities. See *Caterpillar, Inc. v. Department of Treasury*, 440 Mich 400, 488 NW2d. 182 (1992); *cert. den.* 506 U.S. 1014 (1992). Therefore, since 1992 this tax preference for capital investment in Michigan stood as established law, with the apparent blessing of this Court, and has been relied upon by thousands of businesses.

While there are many features of the Michigan SBT CAD and other Michigan tax incentives that are distinguishable from the Ohio ITC invalidated in this case, the Sixth Circuit's decision raises great concern that it intends to embark on an unprecedented change in commerce clause jurisprudence. It appears that the Sixth Circuit is making a significant departure from prior established commerce clause principles by adopting what the Plaintiffs themselves, as well as contemporary academic literature, acknowledge is novel legal theory not directly supported by existing precedents. To provide a measure of certainty, MEDC respectfully urges this Court to review the Sixth Circuit's decision in this matter.